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No. 417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation), *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY TO RESPONDENT'S MEMORANDUM

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In its memorandum the Government urges that the issuance of a writ be limited to the first two questions raised by the petition, taking the view that the first question should be reviewed to resolve a conflict with *United States* v. *Olympic Radio and Television, Inc.*, No. 10, and that the second question should be reviewed because it is related to the first in that both involve "construction of the same and of closely related language appearing in Section 122 (d)(6.)" (Mem. 1-2, 4.) But the third question likewise involves construction of the same language of Section 122 (d)(6) and is closely related to the first two.

Section 122 (d)(6) provides an adjustment for excess profits taxes "paid or accrued within the taxable year."

Question 1 involves the issue of whether an accrual basis taxpayer can take into account under Section 122 (d)(6) taxes "paid" or only taxes "accrued"; in terms of this case it deals with whether petitioner's 1946 and 1947 net operating losses should be increased by reason of excess profits taxes "paid or accrued" within 1946 and 1947. Question 3 (like Question 2) involves the meaning of the term "paid" and of the term "accrued" as used in Section 122 (d)(6);[1] in terms of this case Question 3 deals with whether petitioner's 1947 net operating loss should be increased by reason of excess profits taxes "paid or accrued" within 1947. Questions 1 and 3 involve construction of the same statutory language and are plainly closely related. A decision with respect to Question 3 is therefore necessary to a meaningful and definitive construction of Section 122 (d)(6).

Indeed Question 3 has a significance which transcends Section 122 (d)(6). The question as to whether a remittance constitutes a payment is a recurring question of law of general importance which arises under a number of different sections of the Internal Revenue Code. (Pet. 16-18.) Contrary to respondent's suggestion (Mem. 6), there is no issue of fact involved in Question 3, petitioner having accepted all of the findings of the Tax Court when

[1] Although respondent suggests otherwise (Mem. 5), Question 3 bears precisely the same relationship to Question 1 as does Question 2, there being similar alternative arguments in each instance depending upon the decision of Question 1. If petitioner prevails under Question 1, the issue under Questions 2 and 3 will be the amounts of excess profits taxes deemed to have been "paid" in 1944 (Mem. 4, footnote 3) and 1947, respectively. If respondent prevails under Question 1, the issue under Questions 2 and 3 will be the amounts of excess profits taxes deemed to have "accrued" in such years. In the case of Question 2, petitioner contends that accrual took place in the amount it reported as its tax liability on its tax return for 1944; in the case of Question 3, petitioner contends that accrual took place in the amount of contested taxes it paid in 1947. The reasoning which leads respondent to conclude that Question 2 is closely related to Question 1 (Mem. 4) therefore necessarily leads to the conclusion that Question 3 is likewise closely related to Question 1.

it petitioned for a review to the Circuit Court of Appeals. The issue of law involved was described by counsel for the Government at the hearing before the Tax Court as follows (R. 66):

> "* * * *we will have the question of law whether payments tendered to the Collector when there are no assessments against which they are to be applied, if they can be taken to be payments of tax* * *." (Italics supplied.)

The holding of the Court of Appeals here in issue constitutes another instance of the conflict in the decisions as to whether a remittance in advance of assessment constitutes a payment of tax or a deposit. Although respondent here denies the existence of the conflict and the importance of the "payment" problem, one of his chief legal officers (R. P. Hertzog, Assistant Chief Counsel of the Internal Revenue Service) states in the current (November 1954) issue of Taxes (p. 855, at 859) that under the Internal Revenue Code of 1939 there are

> "* * * a group of related problems dealing with whether a remittance is a payment of tax or a mere deposit. This is important insofar as the statute of limitations as to refunds is concerned, and as to whether there exists a deficiency after such a remittance and whether such a remittance is a payment for interest purposes. The decisions in this area are somewhat difficult to reconcile. It may be that the same payment can be regarded as not the payment of the tax for purposes of starting the statute of limitations, as a payment of the tax for purposes of denying jurisdiction to the Tax Court, and as or as not the payment of a tax for interest purposes, depending upon which court one goes into."[2] (Footnotes omitted.)

These conflicting results have been reached in the face of this Court's admonition in *Rosenman* v. *United States*,

[2] The conflict in the "payment" cases is also pointed out in the articles quoted or cited in the petition herein at page 13, footnote 7, page 16, footnote 13, and page 19.

323 U. S. 658 at 661 (1945), that "It will not do to treat the same transaction as payment and not as payment, whichever favors the Government."

Respondent maintains that *McConkey* v. *Commissioner*, 199 F. (2d) 892 (C.C.A. 4th, 1952), *cert. den.*, 345 U. S. 924 (1953), and *Bendheim* v. *Commissioner*, 214 F. (2d) 26 (C.C.A. 2d, 1954) (where the contest as to liability continued, as in the instant case, after the remittances were made) are not in conflict with the decision below.[3] That a conflict does exist, however, is highlighted by the Hertzog article to which reference has just been made. The cases there cited to illustrate the different results reached in different courts as to identical payments are, on the one hand, the *McConkey* and *Bendheim* cases and, on the other hand, *Thomas* v. *Mercantile National Bank at Dallas*, 204 F. (2d) 943 (C.C.A. 5th, 1953), a case cited by respondent (Mem. 6) to sustain the decision below. The *Mercantile National Bank* case does indeed sustain the decision below, and it is therefore apparent that *McConkey* and *Bendheim*, which are in conflict with *Mercantile National Bank*, are also in conflict with the decision below.

Since even the attempted distinction of *McConkey* and *Bendheim* could have no possible application (Pet. 15) to *Standard Portland Cement Co.* v. *Commissioner*, 80 F. (2d) 585 (C.C.A. 3d, 1935) (a case which the Court below failed to discuss), respondent dismisses the plain conflict with that case by the statement that the taxpayer there made the payment unconditionally. (Mem. 7.) But the taxpayer here also made the remittances unconditionally; the opinion of the Court below does not suggest in any way that they were conditional.[4] The opinion below is predi-

[3] Respondent merely restates (Mem. 6) the distinction of these cases which the Court below sought to make and fails to meet the discussion thereof at pages 12-15 of the petition herein.

[4] The lower Court did not adopt respondent's argument below that the remittances were conditional. And even if the remittances had been conditional when made, the alleged condition would have been satisfied long before the instant case was insti-

cated solely on the ground that the contest as to tax liability continued after the remittance was made,[5] a circumstance which also was present in the *Standard Portland Cement* case. As set forth in the petition herein (pp. 13, 15), that case is squarely in conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to all three questions raised by the petition.

Respectfully submitted,

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tuted. Hence, the ground suggested by respondent for distinguishing the *Standard Portland Cement* case could not possibly apply with respect to one of the issues involved in Question 3, namely, whether after the substantive issues herein are determined, petitioner should be given credit for the remittance of 1945 taxes here in issue in computing the correct amount of the 1945 deficiency in this case. (Pet. 13.)

[5] Respondent cites the *Rosenman* case, *supra* (Mem. 6), in support of the decision herein. But the Court below did "not read *Rosenman* to foreclose treating as a tax payment any remittance made prior to assessment." (Pet. 36.) And the *Rosenman* decision (which involved a remittance made prior to the filing of a tax return and not one made, as in this case, after the Commissioner had issued a statutory deficiency notice) was not grounded in any way, as was the decision below, on the continuance of a contest as to liability after the remittance was made.